Supreme Court, U.S.
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No. 91-1119

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

HERBERT F. McGILL,

Petitioner,

v.

JACK R. DUCKWORTH, ROBERT BRONNENBERG, and BRIAN WEBB,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether "deliberate indifference" under the Eighth Amendment may be found where the uncontroverted evidence shows that prison officials have no knowledge of a particular threat to an inmate's safety.

2. Whether the court of appeals correctly applied Indiana's law regarding contributory negligence and assumption of risk to the facts of the pendent negligence claim.

3. Whether the court of appeals correctly held that a "petition for rehearing" under Fed. R. App. P. 40 is not a "brief" which can be filed by mail under Fed. R. App. P. 25.

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Respondents Jack Duckworth, Robert Bronnenberg, and Brian Webb respectfully pray this Court deny issuance of a writ of certiorari to review the decision entered in *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991).

STATEMENT OF THE CASE

In order to correct inaccuracies and omissions in Petitioner McGill's petition, Respondents, pursuant to Rule 24.2, state the case as follows:

When McGill requested placement in protective custody (Tr. 56), he was placed in his own cell in a segregation unit which housed inmates in disciplinary segregation status and others placed in protective custody. McGill testified he was aware that the unit, IDU, held inmates in both statuses when he submitted his request (Tr. 63-64). McGill was never required to leave his cell, and in fact he remained there until the third day after his transfer to the segregation unit (Tr. 69-70). He testified that he knew he could lock himself in his cell if he chose (Tr. 94-95).

McGill misstates the record when he states that "[s]tatistical evidence showed that the detention unit had a higher incidence of violence and sexual attacks than the prison as a whole" (Petition, p. 9). McGill's evidence actually showed that four assaults and one forced sodomy were reported on all of the prison's detention units in the first three months of 1984 (Plaintiff's Exhibit 5), but that not one sexual assault was confirmed anywhere in the prison in all of 1983 or 1984 (Plaintiff's Exhibit 4).

When McGill asserts that "protective custody people weren't as dangerou[s] to one another as were disciplinary segregation inmates" (Petition, p. 10), he omits the important qualification, "in most cases" (Tr. 372). He also errs in asserting that Webb was "the" guard on the unit at the time of the alleged sodomy (Petition, p. 10). The evidence showed that Webb was one of several officers on the unit during that period of time, although McGill's counsel argued, both to the jury (Tr. 607-08, 612) and to the court of appeals (Brief of Appellee/Cross-Appellant, p. 23 n. 16), that Webb was, or might have been, off the unit at the time.

In any case, McGill testified that he never gave Officer Webb any information about harassment or any information Webb could have used to defend McGill from anyone (Tr. 87).

Webb testified he was unaware that McGill was being threatened by either inmate Ausley or inmate Halliburton and had no reason to know it (Tr. 302-03). McGill also testified that he never gave Superintendent Duckworth or Assistant Superintendent Bronnenberg any information that could be used to defend him from anyone (Tr. 88).

McGill did not "file" his petition for rehearing on October 1, 1991 (Petition, pp. 3, 19), he placed it in the mail that day. That petition for rehearing alleged eleven factual matters which McGill contended the court of appeals had overlooked or misapprehended (Petition, p. 17; Petition for Rehearing, pp. 1-11). Because the petition was not filed within fourteen days of the entry of judgment, Respondents never answered these assertions of error.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW FOLLOWS THIS COURT'S INTERPRETATION OF THE EIGHTH AMENDMENT'S STANDARD FOR FINDING DELIBERATE INDIFFERENCE

This case involves a very narrow factual situation. An inmate, McGill, claimed he was forcibly sodomized by another inmate, Ausley, following threats by Ausley and another inmate, Halliburton. McGill never informed anyone of these threats. The jury, however, found that a prison superintendent and an assistant superintendent, as well as a guard, had been deliberately indifferent to McGill's safety. The district court instructed the jury it could impose liability under that Eighth Amendment standard if the defendant knew "or should have known" McGill was in danger.

The court of appeals, following the language and spirit of this Court's decision last summer in *Wilson v. Seiter*, 501 U.S., 111 S.Ct. 2321 (1991), held that "punishment" cannot be inadvertent. The court held that "'punishment' depends on the mental state of those who cause or fail to prevent it." *McGill v. Duckworth*, 944 F.2d 344, 347 (7th Cir. 1991). Because the defendants could not have been deliberately indifferent to a threat unknown to them, the court held, they could not have been liable under the Eighth Amendment.

That holding is absolutely consistent not only with *Wilson v. Seiter*, 111 S.Ct. at 2325-27, but with every decision of this Court which preceded that decision. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 319 (1986)(requiring "obduracy or wantonness, not inadvertence or error in good faith"); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)(due process analysis) (failure to prevent aggression imposes liability only if intentional); *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976) ("inadvertent failure to provide adequate medical care" not actionable under Eighth Amendment).

Petitioner is incorrect in asserting (Petition, pp. 16-17) that the court of appeals' decision conflicts with other circuits'. In his first-cited case, *Stubbs v. Dudley*, 849 F.2d 83 (2d Cir. 1988), *cert. denied*, 109 S.Ct. 1095 (1989), the inmate plaintiff was being chased by "twenty or more angry prisoners," 849 F.2d at 86, when the defendant officer locked himself into, and Stubbs out of, an administrative area. In the other case, *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), the court posited its reversal upon the very language in a jury instruction which the court of appeals rejected in the case at bar. Even if these cases did conflict with the instant cause, however, *Wilson v. Seiter* itself resolved that conflict.

Moreover the Court of Appeals for the First Circuit has recently reached exactly the same conclusion as the court of

appeals did here. *See DesRosiers v. Moran*, 949 F.2d 15, 19 (1991) (Eighth Amendment liability "requir[es] actual knowledge of impending harm") (citing *Wilson v. Seiter*, *McGill v. Duckworth*).

The court of appeals' decision is not inconsistent with prevailing law. Neither does it portend the ominous consequences advanced by McGill. It merely helps to define the proper constitutional standard by giving value to the adjective "deliberate" in the phrase "deliberate indifference." Whether a prison guard or official was aware of impending harm will be a question of fact, answerable through a variety of types of evidence. In the case at bar, however, that question never seriously arose, because the evidence was uncontroverted: Defendants were not aware of impending harm, and they did not "deliberately" expose McGill to assault.

Petitioner shows no conflict in the decisions, and this issue presents no good reason for the Court to issue a writ.

II.

THE COURT OF APPEALS CORRECTLY RESOLVED THE PENDENT CLAIM UNDER INDIANA LAW

The court of appeals' resolution of the claim under state law relied solely upon McGill's own testimony that after being threatened by Ausley he could have returned to his cell and closed the door but inexplicably chose not to do so. The court also relied upon McGill's testimony that, with Ausley following him, he then proceeded to the shower and stopped to speak with Respondent Webb and another guard but said nothing about Ausley's threats. Based upon this uncontradicted evidence, the court held that under Indiana law McGill

had "assumed the risk," proving the defendants' defense to the pendent negligence claim.

This is a narrow, fact-based question of state law based upon McGill's own words. It presents no "important question of federal law which . . . should be" settled by this Court. *See* Rule 10.1(c).

III.

A PETITION IS NOT A BRIEF

The final issue that McGill would have the Court review on certiorari is whether a petition for rehearing under Fed. R. App. P. 40 is a "brief" under Fed. R. App. P. 25. The first rule requires that a petition for rehearing be filed "within 14 days after entry of judgment," while the latter rule states that "filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing" (emphasis added).

The court below decided this question correctly. A petition is not a brief. If it were, the appellate rules would read quite differently. Moreover, as the court of appeals noted, McGill's "own lawyer did not believe it at the time. The Rules of Appellate Procedure (and our local rules) establish elaborate requirements for the form and content of 'briefs,' none of which McGill complied with." (Appendix D to Petition, p. 121.)

If this rule worked some hardship upon appellate counsel, his remedy was to seek the enlargement provided by the first sentence of Rule 40(a). In any case, a failure to obtain rehearing does not prejudice an unsuccessful party, who can still seek a writ of certiorari in this Court, as McGill has done.

This issue does not "call for an exercise of this Court's power of supervision," Rule 10.1(a), or decide "an important question of federal law," Rule 10.1(c); it does not merit discretionary review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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